

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PENNY J. EHALT**

Claimant

VS.

**CITY OF TOPEKA**

Self-Insured Respondent

Docket No. **1,047,479**

**ORDER**

The self-insured respondent requests review of the September 8, 2011, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral arguments on December 13, 2011.

**APPEARANCES**

Bruce A. Brumley of Topeka, Kansas, appeared for claimant. Sandra M. Sigler of Topeka, Kansas, appeared for respondent.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant sustained a 20 percent whole person functional impairment and that there was insufficient evidence to entitle respondent to a credit against claimant's award for an alleged preexisting impairment.

Respondent raises the following issues: (1) whether the Board should remand the claim to the ALJ to allow additional evidence regarding claimant's impairment of function under the AMA *Guides*<sup>1</sup>; (2) whether respondent is entitled to a credit against claimant's award for preexisting functional impairment pursuant to K.S.A. 44-501(c); (3) the nature and extent of claimant's disability; and (4) whether claimant is entitled to unauthorized and future medical compensation.

Respondent contends the ALJ's award should be vacated and the claim remanded to the ALJ to reopen the evidentiary record. This contention is apparently based on

---

<sup>1</sup> American Medical Association *Guides to the Evaluation of Permanent Impairment*, Fourth Edition. All references in this order are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

difficulties respondent's counsel experienced in obtaining x-rays ordered by Dr. Oller. The purpose for respondent's request to remand the claim to the ALJ is to seek further opinions from Dr. Peter Bieri, the court-ordered neutral physician, regarding claimant's permanent impairment of function.

Claimant argues respondent's request to reopen the record is without merit and that the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

On August 18, 2009, claimant was age 44 and was employed by the City of Topeka's water department. Before her accident claimant had been outside on break and was returning to the building in which she performed her work duties. There was a low area on the sidewalk and it had been a rainy week, resulting in an accumulation of mud on the sidewalk. Claimant exited the sidewalk in an effort to avoid the muddy area. As she did so claimant slipped and partially fell into a valve box located next to the sidewalk. The box itself was a metal structure, the majority of which was below ground level. However, a metal "lid" and a grating covered the opening were above ground level. When claimant slipped the lid and grating moved. As she fell claimant scraped her left leg and hit her right shin on the edge of the box. Claimant's left leg went down into the box. This accidental injury was stipulated by the parties as compensable.

Claimant requested medical care and was initially seen by Dr. Donald Mead. In addition to abrasions, claimant developed hip pain, numbness into the left leg, and numbness in her toes and the bottom of her feet. In December 2009 claimant returned to see Dr. Mead regarding her hip weakness. The doctor diagnosed lower back pain with radiculopathy. Dr. Mead ordered physical therapy. After she completed physical therapy, claimant was referred to Dr. Richard E. Polly, an orthopedic specialist. Claimant was thereafter referred to Dr. Florin O. Nicolae. Dr. Nicolae administered two lumbar epidural steroid injections. Another orthopedic referral was made to Dr. Michael L. Smith. Claimant was released at maximum medical improvement in August 2010.

Claimant sustained one significant prior back injury which occurred on August 9, 1999. That injury also arose out of and in the course of claimant's employment with the City of Topeka. Claimant received a permanent impairment rating from Dr. Phillip Baker of 5 percent to the whole person. Claimant concluded her 1999 claim on a full and final basis by settlement hearing on August 17, 2001. Dr. Baker's May 21, 2001 report containing his 5 percent bodily rating was admitted into evidence at the settlement hearing.

Claimant, who was not represented by counsel at that time, received a lump-sum payment of \$9,000, which approximated a 10 percent permanent partial general bodily disability.<sup>2</sup>

Claimant experienced no radicular symptoms before the August 18, 2009 accident. From 2005 to 2009 claimant did not receive any medical treatment nor did she experience any symptoms in her back or lower extremities.

After her August 2009 injury, claimant was examined at her attorney's request by Dr. Travis Oller, a chiropractic physician, on two occasions: November 12, 2009, and April 28, 2011. Following his April 28, 2011 evaluation, Dr. Oller recommended lumbosacral radiographic studies including lateral extension and flexion views.

Dr. Oller found evidence on physical examination of lumbar radiculopathy. The x-rays ordered by Dr. Oller were taken at St. Francis Hospital on May 1, 2011. Based on his review of the x-rays, Dr. Oller found loss of motion segment integrity. Specifically, the x-rays demonstrated a six millimeter posterior translation of L5 on S1. Dr. Oller placed claimant in DRE Lumbosacral Category V, one of several rating categories set forth in the *AMA Guides*. Dr. Oller testified that in his opinion claimant sustained a 25 percent whole person functional impairment since he found both radiculopathy and a sufficient loss of motion segment integrity to be significant in the *AMA Guides*. The 25 percent impairment was, in Dr. Oller's opinion, caused by the work-related injury in this claim.

Dr. Oller testified as follows regarding the x-ray evidence of loss of motion segment integrity:

Q. Okay. Now, in conducting these measurements did you try to use that page and that figure [from DRE Category V of the *AMA Guides*] as your instructions or guideline to do the measurements?

A. Yes.

Q. And what loss did you find?

A. There was a 6 millimeter posterior translation.

Q. Okay. And if it's more than 5 millimeters what does that mean?

A. There's loss of motion of [sic] segment integrity.

Q. That puts you into category 4?

A. Correct.

---

<sup>2</sup> R.H. Trans., Cl. Ex. 2.

Q. And that -- now, let's assume that the Court was to find that there was no radicular complaints, would she just -- what would her rating be?

A. It would be category 4, 20 percent.<sup>3</sup>

Dr. Daniel Zimmerman examined claimant at the request of her attorney on December 6, 2010. The doctor expressed the opinion that as a consequence of her August 18, 2009 accident claimant sustained permanent aggravation of lumbar disc disease at L3-4, L4-5 and L5-S1. Dr. Zimmerman also found evidence of radiculopathy on physical examination. Dr. Zimmerman opined claimant sustained an 18 percent permanent functional impairment to the body as a whole using the *AMA Guides*. That rating was not based on the DRE categories but instead on the range of motion model. Both methods may be used by the rating physician under the *AMA Guides*.

Dr. Zimmerman testified:

Q. And what do you mean by 'permanent aggravation'?

A. She may have had such abnormalities predating the accident, but after the accident she had ongoing symptoms of -- that were by the time I saw her chronic, so therefore, there had to be permanent aggravation of the pathology at those levels of the lumbosacral spine.

Q. Are you saying the accident made her worse?

A. Yes.

Q. And made her worse permanently?

A. Yes.<sup>4</sup>

Following his initial report, Dr. Zimmerman was provided with Dr. Oller's report in which the flexion and extension x-rays Dr. Oller ordered were discussed. Dr. Zimmerman prepared a supplemental report<sup>5</sup> in which he noted that the x-rays originally taken in his office on December 6, 2010, did include lateral flexion and extension views. Although Dr. Zimmerman conceded that his x-rays were "technically not of superior quality,"<sup>6</sup> they did reveal at least a six millimeter translation of L5 on S1. Dr. Zimmerman therefore

---

<sup>3</sup> Oller Depo. at 29.

<sup>4</sup> Zimmerman Depo. at 12.

<sup>5</sup> *Id.*, Ex. 3.

<sup>6</sup> *Id.*

concurred, both in his supplemental report and in his deposition testimony, with Dr. Oller's opinion regarding loss of motion segment integrity.

The ALJ ordered Dr. Bieri to perform a neutral medical evaluation. Dr. Bieri examined claimant on June 13, 2011. Dr. Bieri found no clinical evidence of true radiculopathy. Dr. Bieri noted that a lumbar MRI scan was conducted on April 19, 2010, which revealed only mild degenerative changes from L3 through S1. Dr. Bieri also noted that an EMG/NCV test was conducted during the course of claimant's treatment and it showed normal neurologic function in the lower extremities. Dr. Bieri testified that there was nothing in the medical records provided by counsel which showed claimant sustained a loss of motion segment integrity. Dr. Bieri found that claimant's work-related injury aggravated her preexisting condition and placed claimant in DRE Lumbosacral Category II for a 5 percent whole person impairment. Dr. Bieri's 5 percent rating is in addition to any preexisting impairment.

Dr. Phillip Baker, an orthopedic surgeon, examined claimant on June 23, 2011, at the request of respondent's counsel. Dr. Baker placed claimant in DRE Lumbosacral Category II, which results in a 5 percent bodily impairment, the same impairment rating provided by Dr. Baker in 2001. It was therefore Dr. Baker's opinion that claimant sustained no additional impairment related to the August 18, 2009 accidental injury. Dr. Baker did not review any lateral flexion and extension x-ray views of the lumbosacral spine and accordingly had no opportunity to perform the measurements required by the *AMA Guides* to determine the degree of motion segment integrity loss, if any.

At the regular hearing, claimant's terminal date was set by the ALJ for May 23, 2011 and respondent's terminal date was set for June 22, 2011. Thereafter, there were three terminal date extensions, all by agreement of the parties and all embodied in orders entered by the ALJ:

(1) Agreed order filed on May 16, 2011, extending claimant's terminal date to June 29, 2011, and respondent's terminal date to July 29, 2011.

(2) Agreed order filed on June 24, 2011, extending claimant's terminal date to July 29, 2011, and respondent's terminal date to August 29, 2011.

(3) Agreed order and stipulation filed on July 29, 2011, extending claimant and respondent's terminal dates to August 29, 2011, to allow time for Dr. Bieri to respond to a joint inquiry sent by both counsel regarding future medical treatment.

### **PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Functional impairment for nonscheduled injuries is defined in K.S.A. 44-510e(a) as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.<sup>7</sup>

K.S.A. 2009 Supp. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.** (Emphasis added)

K.S.A. 2009 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 2009 Supp. 44-523(a) states in relevant part:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

---

<sup>7</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation; . . . (3) on application for good cause shown.

### **ANALYSIS**

At oral argument, counsel for the parties agreed that difficulties obtaining the x-rays performed on May 1, 2011, were encountered prior to the entry of the award. Those x-rays were relied upon by Dr. Oller in arriving at his opinion about permanent functional impairment. Evidently, those x-rays were on a compact disc which may have become lost by St. Francis Hospital, where the x-ray studies were performed, or by someone else. In the absence of the actual films or the disc Dr. Bieri was unable to provide an opinion regarding claimant's loss of motion segment integrity. Dr. Bieri did not take x-rays in his office. By the time Dr. Bieri was deposed he had been provided with paper copies, or some other form of reproduction, of the x-rays. However, the reproductions were, according to Dr. Bieri, inadequate to allow the precise measurements necessary to determine the extent of motion segment integrity loss. In addition, Dr. Bieri testified that he was uncomfortable making such measurements anyway because of his lack of expertise in radiology.

The Board is cognizant that it is very often challenging to obtain records, reports, testing results, and other material from medical providers. Respondent evidently experienced such difficulties in this claim due to no fault of either party or their counsel.

However, the remedy for respondent's dilemma does not lay with the Kansas Workers Compensation Board. Pursuant to K.S.A. 2009 Supp. 44-523(b), any issue about reopening the record or extending terminal dates should have been directed to the ALJ before the award was entered. Since respondent did not request an extension of its terminal date or reopening the record, the ALJ made no ruling on those issues.

The Board has authority to remand a claim to an ALJ<sup>8</sup>, however, in this claim there is no ruling of the ALJ for the Board to review.

---

<sup>8</sup> K.S.A. 44-551(h)(i)(1).

Respondent relies on *Monteleone*<sup>9</sup> to support its position that the Board must remand this claim. However, the circumstances in *Monteleone* are distinguishable from those in this claim. In *Monteleone*, the ALJ issued an award without consideration of a deposition taken by respondent within its terminal date. No such circumstance is present here. Respondent's request that the Board remand the claim to the ALJ for the purpose of reopening the record is without merit and the claim will not be remanded.

With regard to respondent's position regarding its entitlement to a credit for preexisting impairment of function under K.S.A. 2009 Supp. 44-501(c), the Board agrees with the ALJ. Under *Hanson*<sup>10</sup> respondent has the burden to prove the amount of preexisting impairment once claimant presents evidence of aggravation of a preexisting condition. Claimant presented evidence via the testimony of claimant, Dr. Zimmerman, and Dr. Oller that her preexisting low back condition was aggravated by the August 18, 2009 accident. The evidence offered by respondent to support its entitlement to a credit is Dr. Baker's testimony and his reports dated June 30, 2011, and May 21, 2001, in which Dr. Baker rated claimant's permanent impairment at 5 percent to the body.

The Board is persuaded that Dr. Baker's opinions in this claim are not entitled to significant weight. Dr. Baker actually issued two rating reports in 2001. His initial rating was 10 percent to the body as a whole.<sup>11</sup> After his initial rating, he evidently received correspondence from respondent<sup>12</sup> and, as a result of that correspondence, Dr. Baker reduced his rating from 10 percent to 5 percent bodily impairment.<sup>13</sup> Precisely what information was provided by respondent to Dr. Baker is not in the record, but evidently the notion was imparted to Dr. Baker that there had been an "...improvement in [claimant's] condition . . . ." <sup>14</sup> Dr. Baker's reduction of his rating by 50 percent based solely on a letter, the contents of which are not reflected in the record, lessens the credibility to be afforded Dr. Baker's opinions. The unknown truth or falsity of the letter's contents makes Dr. Baker's 2001 rating unreliable at best. That lack of reliability is compounded by the apparent absence, before Dr. Baker cut his rating in half, of any additional history or current complaints from his patient, any updated findings on physical examination, or even a telephone call to his patient to inquire about her current condition. These circumstances

---

<sup>9</sup> *Monteleone v. Hy-Vee Food Stores, Inc.*, Nos. 1,004,974 & 1,016,044, 2007 WL 4296008 (Kan. WCAB Nov. 30, 2007).

<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 92, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

<sup>11</sup> Baker Depo., Ex. 1 at 2.

<sup>12</sup> *Id.*, Ex. 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, Ex. 1 at 2.



in turn adversely affect the extent to which Dr. Baker's opinions satisfy respondent's burden regarding its claim for a credit under K.S.A. 2009 Supp. 44-501(c).

Dr. Baker is the only medical witness in this claim to find preexisting functional impairment. Drs. Oller, Zimmerman and Bieri apportioned none of their ratings to an impairment which preexisted the accidental injury in this claim. The Board agrees with the ALJ that respondent has not sustained its burden of proving a preexisting functional impairment which would entitle respondent to a credit against claimant's award pursuant to K.S.A. 2009 Supp. 44-501(c).

With regard to claimant's permanent functional impairment, the preponderance of the credible evidence does not establish that claimant developed radiculopathy as a consequence of her August 18, 2009 accidental injury. The neutral physician, Dr. Bieri, testified that he could not identify true radiculopathy based on his physician examination. The lack of radiculopathy was confirmed by the lumbar MRI scan dated April 19, 2010, which showed only minimal degenerative changes at L3 through L5 without any indication of neurological involvement, and by an EMG/NCV test performed on July 29, 2010, which was a normal study with no clear findings of lumbar radiculopathy.

However, the preponderance of the credible evidence establishes that claimant's functional impairment is appropriately within DRE Lumbosacral Category IV by reason of loss of motion segment integrity, consisting specifically of a six millimeter posterior translation of L5 on S1. The testimony of both Drs. Oller and Zimmerman support those findings and support a rating of 20 percent to the body as a whole.<sup>15</sup> Neither Dr. Bieri nor Dr. Baker reviewed the necessary x-rays to enable them to express opinions about loss of motion segment integrity. Again, Dr. Baker's opinion is lacking in credibility because his testimony that the current injury resulted in no impairment is contrary to the opinions of all the other medical witnesses in the claim and is also contrary to claimant's testimony, which is relevant on the issue of her physical condition.<sup>16</sup> As a result, the Board is persuaded that claimant has sustained her burden of proof that she sustained a 20 percent permanent functional impairment to the body as a whole as a result of the August 18, 2009 accidental injury and is accordingly entitled to permanent partial general bodily disability compensation based on her functional impairment, pursuant to K.S.A. 44-510e.

The Board finds that claimant is entitled to unauthorized and future medical compensation as set forth on page four of the ALJ's Award.

---

<sup>15</sup> Oller Depo. at 29; Zimmerman Depo. at 18.

<sup>16</sup> See *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

**CONCLUSIONS**

(1) Respondent is not entitled to have this claim remanded to the ALJ for the presentation of further evidence or for the extension of its terminal date.

(2) Respondent has not sustained its burden to prove a preexisting functional impairment and is not entitled to a credit pursuant to K.S.A 2009 Supp. 44-501(c).

(3) Claimant has sustained her burden to prove that she has a 20 percent permanent bodily functional impairment as result of her accidental injury on August 18, 2009, and is entitled to permanent partial disability benefits based on that impairment rating.

(4) Claimant is entitled to unauthorized and future medical compensation per the ALJ's award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this review.<sup>17</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 8, 2011, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2012.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

---

<sup>17</sup> K.S.A. 2009 Supp. 44-555c(k).

c:     Bruce A. Brumley, Attorney for Claimant  
       Sandra M. Sigler, Attorney for Respondent  
       Brad E. Avery, Administrative Law Judge